NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW

Volume 9 | Number 2 Article 5

Spring 1984

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Recommended Citation

E. Thomas Watson, *Power of Attorney as a Protective Device for Foreign Owned United States Assets*, 9 N.C. J. INT'L L. 273 (2016).
Available at: https://scholarship.law.unc.edu/ncilj/vol9/iss2/5

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Power of Attorney as a Protective Device for Foreign Owned United States Assets

E. Thomas Watson*

I. Introduction: The Need for Protective Devices

The high degree of protection given to private property throughout United States history has attracted foreign investments to our country since World War II. For many foreign investors, however, the evident political stability of the United States and our tradition of protecting private ownership of property has not been enough to ease their fears that their United States holdings might be blocked, confiscated or otherwise interfered with by the United States or a foreign government. The source of such action could be their own country, a third country through which they hold their United States investments (*e.g.*, a tax haven country) or even the United States. These investors' fears have been intensified by such events as the freezing of the assets of the ex-Shah of Iran and his family in the United States,[1] the earlier freezing of the revolutionary Iranian government's assets by the United States[2] and by upheavals and near-upheavals elsewhere in the world. Accordingly, lawyers, trust companies and other advisors worldwide are promoting a variety of schemes, often involving trusts organized in tax havens, to protect foreign investments in the United States against expropriation or blocking by either the investor's home government or that of the United States.[3] Elaborate escape provisions then seek to protect the entity from attempted expropriations by the government of the tax haven itself.

This article questions the efficacy of this approach. An examination of cases arising under the Trading with the Enemy Act[4] ("TWEA") demonstrates that the power and willingness of United States courts to look through a variety of cloaking devices is virtually unlimited. Anticipating the worst, as one must, even to consider the need for these "doomsday

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[1] *See* Exec. Order No. 12,284, 3 C.F.R. 115 (1981), *reprinted in* 50 U.S.C. § 1701 at 870 (Supp. V 1981).

[2] *See* Exec. Order No. 12,170, 3 C.F.R. 457 (1979), *reprinted in* 50 U.S.C. § 1701 at 864 (Supp. V 1981).

[3] *See, e.g.*, Knight, *Failsafe Legal Structures to Protect U.S. Assets of Foreign Investors Against Political Emergencies*, INVESTMENT U.S.A., Special Supp. Aug. 1983, at 1.

[4] 50 U.S.C. app. §§ 1-44 (1976 & Supp. V 1981).

trusts," it must be presumed that a foreign government intent on seizing its nationals' property would be equally vigorous in piercing the veil of sanctuary trusts and corporations. In that event, the final, deciding challenge to the ownership of assets situated in the United States would have to be made and defended in United States courts, and not in the courts of the country where the trust was organized. Thus, regardless of the domicile of the holding entity, United States law and public policy will always apply.[5]

In addition, the elaborate devices advocated by some writers[6] for changing the domicile of tax haven trusts, or for "decanting" their assets into still other trusts, demonstrate that the selection of a holding entity in a third country increases the number of governments with the possible ability to interfere with the original owner's rights of ownership. If these provisions are ever triggered, the owner of the trust may face the additional problem of serious United States tax consequences.[7] Thus, although other factors such as tax advantages and bank secrecy laws may well justify the use of a tax haven trust or holding company, a decision to establish such an entity should not be made for reasons of political security. Any ultimate political security advantage is likely to be outweighed by the more immediate problems of impaired flexibility of ownership and control, and reduced ability to gain immigrant or nonimmigrant status to enter the United States.

As an alternative to the complexities of third country trusts, particularly now that their tax advantages appear to be declining,[8] this article proposes the use of a broadly-drafted state power of attorney, to be held (but filed only if needed) by the investor's United States attorney. This device has worked in past revolutionary confiscations,[9] is infinitely adaptable to changing circumstances, and does not commit the investor to a cumbersome alternative to direct ownership of his investments. If needed, the power of attorney can be drafted and executed in conjunction with a United States will and/or stand-by trust. In at least one situation — an interference with communications caused by war or natu-

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[5] Faced with the problem of determining the proper situs of stock in a Canadian investment company held by a New York bank in a custodian account for the benefit of the King of Iraq, the Second Circuit declined to explore the theoretical subtleties of the problem and instead recognized the practical reality of that and all other situations involving United States assets. "Only a court in the United States could compel the bank to pay the balance in the account or to deliver the certificates it held in custody. The property here at issue thus was in the United States." Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 51 (2d Cir. 1965), *cert. denied*, 328 U.S. 1027 (1966).

[6] *See* Knight, *supra* note 3.

[7] *See, e.g.*, Klein, *Tax Aspects of Protective Devices Against Expropriation*, 30 TAX LAW. 369 (1977); Knight, *supra* note 3.

[8] *See* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 92-248, § 342, 96 Stat. 324, 635 (not codified).

[9] *See* Fred S. James & Co. v. Rossia Ins. Co. of Am., 247 N.Y. 262, 160 N.E. 364 (1928) (Russian businessman may reserve power of attorney to preserve assets from confiscation in revolution).

ral catastrophe — it is superior to other protective devices. Most importantly, it has the appealing advantage of utter simplicity.

A protective device for the United States might be needed in the following three basic situations and their several variants. First, invasion or revolution in a foreign country could bring into power a new government which attempts to confiscate the foreign assets of its nationals. This could occur in the investor's home country or it could occur in a tax haven state where the investor has already organized a holding entity, perhaps to avoid the effects of revolution in his home country. Second, these same political events could also trigger confiscation or a freeze of assets by the United States government. Third, war, civil insurrection, private kidnapping or natural calamities may make it impossible for the alien to communicate instructions which are necessary to safeguard and increase the value of his United States investments.

II. Confiscation by a Foreign Government

Regardless of whether the domestic law of the displaced regime sanctioned expropriations or not, international and United States domestic law[10] fully recognize the right of a sovereign state to expropriate, without compensation,[11] all forms of private property within its borders, whether belonging to aliens or to nationals of that state.[12]

In the United States, the legitimacy of the confiscation is upheld in practice by the "act of state doctrine," a judge-created rule which is firmly entrenched in the federal common law,[13] whereby courts refrain from inquiring into the legality of the confiscation.[14] While the existence of the act of state doctrine is well settled, the extent of its reach is not.[15] Until recently, a fundamental limitation of the doctrine was that it had

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[10] On international law, *see generally* Seidl-Hohenvelden, *Extraterritorial Effects of Confiscations and Expropriations*, 49 MICH. L. REV. 851 (1951); Note, *Expropriations in International Law*, 48 IOWA L. REV. 878 (1963). On U.S. law, *see generally* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

[11] For convenience, "expropriation" will be used to refer to any governmental taking of private property, and "confiscation" will be used to refer to an expropriation without compensation.

[12] "[C]onfiscations by a state of the property of its own nationals, no matter how flagrant and regardless of whether compensation has been provided, do not constitute violations of international law." F. Palicio y Compania, S.A. v. Brush, 256 F. Supp. 481, 487 (S.D.N.Y. 1966), *aff'd per curiam*, 375 F.2d 1011 (2d Cir.), *cert. denied*, 389 U.S. 830 (1967). International law requires that a taking of the property of aliens must be fully and effectively compensated. *See Nationalization and International Law: Testimony of Elihu Lauterpacht, Q.C.*, 17 INT'L LAW. 97 (1983); Note, *supra* note 10. *But see* G.A. Res. 3171, 28 U.N. G.A.O.R. Supp. (No. 30) at 3, U.N. Doc. No. A/9030 (1973) (full and effective compensation not required in some circumstances).

[13] *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Underhill v. Hernandez, 168 U.S. 250 (1897).

[14] *See* Williams, *The Act of State Doctrine: Alfred Dunhill of London, Inc. v. Republic of Cuba*, 9 VAND. J. TRANSNAT'L L. 735, 736 (1976).

[15] *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (plurality opinion, with 2 concurrers and 4 dissenters); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (plurality opinion, with 2 separate concurrers and 4 dissenters). *See generally* Williams, *supra* note 14, at 742 & n.47.

no effect on attempted expropriations of property located outside the territory of the expropriating state.[16] This limitation of the territorial effect of the act of state doctrine has enabled many foreigners to retain their United States assets despite decrees of expropriation by their home country's government.[17] For many aliens, the knowledge of these past successes constitutes all the protection they want for their United States property.

The territorial limitation, however, is not absolute. Courts have recognized a few exceptions to its scope,[18] and several commentators have criticized its limiting effect on the confiscatory reach of supposedly deserving Third World governments.[19] In fact, perceived weaknesses in the protection offered by the doctrine lie behind many of the commercial trust schemes now being advocated.[20] A critical question, then, for the lawyer advising foreign investors on the safety of their United States assets is what is the viablity of the act of state doctrine and its territorial limitation.

The most recent "classic" statement of the act of state doctrine and the territorial limitation was made by Judge Friendly in *Republic of Iraq v. First National City Bank*.[21] King Faisal II of Iraq opened a bank account and deposited various sums with the defendant bank at its offices in New York. He also opened a custodian account in the same offices and deposited stock certificates to a Canadian investment trust therein. Following a military coup in which the King was overthrown and killed, the new revolutionary government issued an ordinance purporting to confiscate all of the King's assets and property interests, wherever found. Iraq then took the relatively rare step of searching out the foreign assets and laying claim to those found in the United States.[22]

The Second Circuit held that the confiscation ordinance was an act of state that an American court was required to respect. Therefore, it refused to inquire whether the ordinance was proper under Iraqi or international law. The court noted, however, that a United States court need not enforce a foreign act of state to the extent that it attempted to affect

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[16] *See, e.g.*, *Sabbatino*, 376 U.S. at 413-14; *Underhill*, 168 U.S. 250 (1897); *Brush*, 256 F. Supp. at 487 (S.D.N.Y. 1966).

[17] *See, e.g.*, Carl Zeiss Stiftung v. VEB Carl Zeiss Jena, 433 F.2d 686 (2d Cir. 1970); Plesch v. Banque Nationale de la Republique d'Haiti, 273 A.D. 224, 77 N.Y.S.2d 43, *aff'd per curiam*, 298 N.Y. 573, 81 N.E.2d 106 (1948); Bollack v. Societe Generale pour Favoriser le Developpement du Commerce et de l'Industrie en France, 263 A.D. 601, 33 N.Y.S.2d 986 (1942), *aff'd per curiam*, 293 N.Y. 652, 56 N.E.2d 253 (1944).

[18] *See* United States v. Pink, 315 U.S. 203 (1942), discussed *infra* at notes 32-34 and accompanying text; Banco Nacional de Cuba v. Chemical Bank of N.Y., 658 F.2d 903 (2d Cir. 1981), discussed *infra* at note 48; Anderson v. N.V. Transandine Handelmaatschappij, 289 N.Y. 9, 43 N.E.2d 502 (1942), discussed *infra* at 48 and accompanying text.

[19] *See* Crockett, *Extraterritorial Expropriations*, 13 IND. L. REV. 655, 674 (1980); Note, *supra* note 10.

[20] *See* Knight, *supra* note 3.

[21] 353 F.2d 47 (2d Cir. 1945), *cert. denied*, 382 U.S. 1027 (1966).

[22] *Id.* at 49-50.

title to property located in the United States, if the act of state was incompatible with United States public policy.[23]

The court held that the intangible property was "located" in the United States. It also held that confiscations were, in almost all cases, contrary to public policy and therefore, not enforceable within the United States. According to the court, confiscations of corporate and personal property are "shocking" to the American sense of justice, and even though the Fifth Amendment is not binding on other nations, it is indicative of American public policy regarding confiscations.[24] The court summarized: "Foreigners entrusting their property to custodians in this country are entitled to expect this historic policy to be followed save when the weightiest reasons call for a departure . . . . The policy of the United States is that there is no such thing as a 'good' confiscation by legislative or executive decree."[25] Therefore, the court refused to honor Iraq's claim to the King's United States assets.

The act of state doctrine and the territorial limitation as stated in *Republic of Iraq* have been applied with equal stringency to assets owned by foreigners and to assets owned by American citizens.[26] The doctrine has been applied to assets owned by foreign corporations as well,[27] despite the theoretical problems caused when a foreign government confiscates the assets of a corporation organized under the laws of the foreign state, thus dissolving the corporation in the state in which it was incorporated.[28] Other thorny theoretical problems are created when a foreign state leaves the corporate form intact and confiscates only the corporation's shares in the hands of its resident shareholders.[29] In both instances, American courts have ignored theory to protect assets situated in the United States from confiscation.[30] This willingness to overlook the-

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[23] *Id.* at 51.

[24] *Id.* at 52.

[25] *Id. Accord Plesch*, 273 A.D. 224, —, 77 N.Y.S.2d 43, 49 (1948) ("Confiscation in ostensible compliance with foreign edicts which are void in this State, has sometimes been compared, in its legal effect, to action by thieves or marauders").

[26] *See* Tran Qui Than v. Regan, 658 F.2d 1296, 1303-04 (9th Cir. 1981); *Plesch*, 273 A.D. 224, 77 N.Y.S.2d 43.

[27] The *Republic of Iraq* language specifically embraced both corporations and individuals. *See Republic of Iraq*, 353 F.2d at 51. In United States v. Belmont, 301 U.S. 324, 332 (1937), the Court suggested in dicta that the property of a corporation might not be as deserving of protection as the property of individuals, but this proposition has yet to be adopted by any court.

[28] *See* Mann, *The Confiscation of Corporations, Corporate Rights, and Corporate Assets and the Conflict of Laws*, 11 INT'L & COMP. L.Q. 471 (1962). *See also* Vishipco Line v. Chase Manhattan Bank, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 103 S. Ct. 313 (1982) (decree expropriating all plaintiff Vietnamese corporation's Vietnam assets held neither to dissolve the plaintiff corporation nor to expropriate the plaintiff's U.S. assets).

[29] *See* Seidl-Hohenvelden, *supra* note 10, at 857; Mann, *supra* note 28.

[30] Where possible, U.S. courts will hold that an intangible asset has a U.S. situs. *See Vishipco*, 654 F.2d at 862; *Carl Zeiss Stiftung*, 433 F.2d at 699 (2d Cir. 1970); *Republic of Iraq*, 353 F.2d at 51; *Brush*, 256 F. Supp. at 492 n.12. *Cf.* State of the Netherlands v. Fed. Reserve Bank of N.Y., 201 F.2d 455, 463 (2d Cir. 1953); *Fred S. James & Co.*, 247 N.Y. at 269-70, 160 N.E. at 366-67.

ory in favor of asset protection is another indication of the general repugnance that American courts feel for foreign nationalizations.

The court in *Republic of Iraq* noted that the United States Supreme Court appeared to violate the policy against "good" confiscations in *United States v. Belmont*[31] and again in *United States v. Pink*.[32] These cases involved the so-called Litvinov Assignment.[33] As a result of its wholesale confiscations following the Bolshevik Revolution, the Soviet Government asserted numerous claims against assets of former Russian corporations and individuals located in the United States. Many persons in the United States likewise had claims against the Soviet Government, which was not recognized by the United States for several years folowing the Revolution. As a part of the overall negotiations and arrangements which concluded in the recognition of the Soviet Government on November 16, 1933, the United States agreed, by exchange of diplomatic notes with the Soviet Foreign Minister Litvinov, to accept the assignment by the Soviet Government of all of its claims against assets located in the United States. The United States then pursued those assets and held them to satisfy the claims of Americans against the Soviet Union.[34] This procedure placed the United States in the unlikely position of debt collector for the Soviet Union.

In *Belmont*, the United States sued in probate to recover a sum of money deposited with a private banker in New York prior to 1918 by a Russian corporation which was later dissolved by Soviet decree.[35] In *Pink*, the United States sued the New York Superintendent of Insurance to recover the assets of the New York branch of a Russian insurance company which remained after the Superintendent had wound up the corporation and paid its creditors.[36] In both cases, the Supreme Court upheld the assignment and the United States' prevailing interest in the property. The *Belmont* Court in particular used sweeping language to justify its holding. "[E]very sovereign state must recognize the independence of every other sovereign state; and . . . the courts of one will not sit in judgment upon the acts of the government of another, done within its own territory."[37] This, of course, is the act of state doctrine. The Court, however, went on to hold that the public policy of the United States was not offended by the taking, seemingly because "what another country has done in the way of taking over property of its national, and especially of its corporations, is not a matter for judicial consideration here."[38] Some commentators suggested that this language overruled the

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[31] 301 U.S. 324 (1937).

[32] 315 U.S. 203 (1942).

[33] Litvinov Agreement, Nov. 16, 1933, United States-Soviet Union, 11 Bevans 1248, 1256-57.

[34] *Id.* at 1256-57. *See also Belmont*, 301 U.S. at 326-27.

[35] *Belmont*, 301 U.S. at 326-27.

[36] *Pink*, 315 U.S. at 210-14.

[37] *Belmont*, 301 U.S. at 327.

[38] *Id.* at 332.

territorial limitation of the act of state doctrine as it applied to foreign governments recognized by the United States.[39]

Subsequent decisions have found alternative and somewhat more reassuring grounds for the *Belmont* holding. United States public policy was not offended by the enforcement of the Soviet confiscations in the United States because our government endorsed them by accepting the Litvinov Assignment. It was this foreign policy decision by the Executive which overcame the traditional hostility of the United States towards confiscations.[40]

Foreign policy has cleansed other government takings of the taint of confiscation and allowed them to be enforced in the United States. Immediately after the invasion of The Netherlands by the Germans in World War II, the Dutch government-in-exile issued Royal Decree A1 which purported to place title to all intangible property belonging to Dutch citizens resident in the occupied territory in the name of the state, which was represented by the government-in-exile. The decree stated that the taking was solely for the purpose of conserving the assets and that they would be returned to the owners after the war.[41] The United States courts upheld these takings against persons who acquired securities in violation of the decree from the Germans. These were "good" confiscations, fully supported by United States foreign policy and not intended to be permanent.[42]

With these two exceptions, the territorial limitation to the act of state doctrine had seemed as fundamental as the doctrine itself and as unlikely to change. In *Banco Nacional de Cuba v. Sabbatino*,[43] however, the United States Supreme Court found "constitutional underpinnings" for the doctrine but not for the limitation, and thus seemed to prepare the way for a future court to hold that the territorial limitation was not an absolute bar to the foreign state's confiscation.[44] Two subsequent Supreme Court cases have only strengthened the doctrinal confusion expressed by *Sabbatino*.[45] Neither of these decisions commanded a majority and the multiple opinions accommodate almost every possible viewpoint. Despite the intellectual disarray of the opinions, however, the results squarely support the territorial limitation.

Other indications support the conclusion that the territorial limitation is still valid. The Second Circuit's formulation of the doctrine in

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[39] *See* Seidl-Hohenvelden, *supra* note 10, at 854. *See also* United States v. N.Y. Trust Co., 75 F. Supp. 583 (S.D.N.Y. 1946).

[40] *See Sabbatino*, 376 U.S. at 414; *Republic of Iraq*, 353 F.2d at 52; *Bollack*, 263 A.D. at , 33 N.Y.S.2d at 988; Seidl-Hohenvelden, *supra* note 10, at 854.

[41] *See, e.g.*, *Anderson*, 289 N.Y. 9, 43 N.E.2d 502 (1942).

[42] *Id.*; *State of the Netherlands*, 201 F.2d at 460-61.

[43] 376 U.S. 398 (1964).

[44] *Id.* at 423. At least one commentator has argued that *Sabbatino* implicitly rejected the territorial limitation. *See* Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805 (1964).

[45] *See Dunhill*, 425 U.S. 682; *First Nat'l City Bank*, 406 U.S. 759.

Republic of Iraq was cited with apparent approval by the Supreme Court in its last case, *Alfred Dunhill of London, Inc. v. Republic of Cuba.*[46] Moreover, the Court's musings regarding the constitutional underpinnings of the doctrine appear to have given way to an explanation founded in judicial restraint and a desire not to embarrass the Executive in its practice of foreign policy.[47] Thus, the territorial limitation seems once again to be as firmly established as the act of state doctrine itself. Lower courts[48] and commentators[49] still adhere to the territorial limitation in its pure form.

III. Freezing or Vesting by the United States Government

Foreign investors have more to fear than the actions of their governments. The same invasion or revolution which brings a confiscation-minded government to power in a foreign country may also trigger war or less violent hostilities between that country and the United States. The United States Executive possesses broad powers to freeze or "vest" assets owned by foreigners in the United States in the event of declared war or proclaimed national emergency.

The International Emergency Economic Powers Act ("IEEPA")[50] allows the President, under circumstances defined by the National Emergencies Act,[51] to freeze (the word "block" is also used) foreign assets in the United States. The President may regulate or prohibit foreign exchange transactions, the use of the banks by foreign countries or nationals and the holding, use, transfer or exercise of any power with respect to "any property in which any foreign country or national thereof has any interest."[52] In addition, the President may require any person subject to the jurisdiction of the United States to furnish complete information under oath regarding property and transactions subject to the Act.[53]

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[46] *Dunhill*, 425 U.S. at 687.

[47] *See Sabbatino*, 376 U.S. at 423; Williams, *supra* note 14, at 736, 753-54, 761.

[48] *See, e.g.*, *Carl Zeiss Stiftung*, 433 F.2d at 698; *Republic of Iraq*, 353 F.2d 47; *Brush*, 256 F. Supp. 481. But one panel of the Second Circuit has been over-eager to find that a Cuban confiscation was not contrary to United States foreign or public policy. *Banco Nacional de Cuba*, 658 F.2d at 908-09. The court based its remarkable holding that enforcement of a Cuban confiscation decree in the United States did not violate United States public policy on the fact that no former owners of the confiscated banks had stepped forward in the United States in twenty years of litigation. *Id.* at 909. It is hoped that this decision will be limited to its facts.

[49] *See, e.g.*, Crockett, *supra* note 19; Kenney, *Expropriations of Offshore Branches of American Banks Located in Foreign Tax Havens*, 14 INT'L LAW. 286 (1980); Williams, *supra* note 14; Comment, *Foreign Expropriation Cases in the United States: Conflicting Legislation and Judicial Policies*, 17 U.S. FOREIGN L. REV. 117 (1982). The latter comment, however, notes strong resistance by the courts to Congressional efforts to weaken the basic act of state doctrine, and the Crockett article argues for upholding certain supposedly justified third world confiscations.

[50] 50 U.S.C. § 1701 (Supp. V 1981).

[51] National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified in scattered sections of 8, 10 and 50 U.S.C.).

[52] 50 U.S.C. § 1702(a)(1)(B) (Supp. V 1981).

[53] *Id.* § 1702(a)(2) (Supp. V 1981).

There has been no reported test of whether this provision authorizes the President to override the attorney-client privilege.

The language of the IEEPA is sweeping. During its short history it has been applied with drastic results. When the American diplomatic hostages were seized by Iran, President Carter used the Act to freeze all "property and interests in property of the Government of Iran, its instrumentalities and controlled entities and The Central Bank of Iran which are or became subject to the jurisdiction of the United States or which are or come within the possession or control of persons subject to the jurisdiction of the United States."[54]

Subsequent executive orders issued during the Iranian crisis implemented the so-called Algiers Declarations[55] which freed the hostages by (1) nullifying all existing and otherwise valid judicial attachments of Iranian government property in the United States (by that time frozen by the earlier executive order); (2) ordering the transfer of the foreign assets to a special fund abroad; and (3) setting aside all judgments and terminating all lawsuits against the government of Iran by American creditors.[56] A related executive order froze the assets of the ex-Shah of Iran and his family in the United States so as to permit the revolutionary government to pursue its claims against those persons.[57]

These executive orders and the President's power to act under the IEEPA were broadly upheld by the United States Supreme Court in *Dames and Moore v. Regan*,[58] in which the Court stated: "We think both the legislative history and the cases interpreting the TWEA [Trading with the Enemy Act] fully sustain the broad authority of the Executive when acting under this Congressional grant of power."[59]

Freezing orders permit the President to carry out his constitutional foreign policy powers by permitting him to use foreign assets as a bargaining chip in negotiations, the Court held, so their implementation is virtually unlimited by the Constitution.[60] The case arose when a United States company challenged the Executive's nullification of a judicial attachment obtained by the company of certain Iranian assets located in the United States. The assets had been made available for attachment by the plaintiff when they were frozen by executive order. The freeze which the plaintiff in *Dames and Moore* exploited was not challenged by that plaintiff. Nonetheless, the decision impliedly upheld the freeze as

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[54] Exec. Order No. 12, 170, 3 C.F.R. 457 (1979), *reprinted in* 50 U.S.C. § 1701 at 864 (Supp. V 1981).

[55] Algiers Declaration, Jan. 19, 1981, United States-Algeria-Iran, *reprinted in* 81 DEP'T ST. BULL. 1 (Feb. 1981).

[56] *See* Dames & Moore v. Regan, 453 U.S. 654, 664-66 (1981). *See also* Exec. Orders Nos. 12.276-12.284, 3 C.F.R. 104-18 (1981), *reprinted in* 50 U.S.C. § 1701 at 866-72 (Supp. V 1981).

[57] Exec. Order No. 12.284, 3 C.F.R. 115 (1981), *reprinted in* 50 U.S.C. § 1701 at 870 (Supp. V 1981).

[58] 453 U.S. 654 (1981).

[59] *Id.* at 672.

[60] *Id.* at 673-74.

well as the subsequent transfer of the assets. The plaintiff's interest in its attachments (which were only made possible by the earlier freeze) was conditional and revocable, and as such, the President's transfer of the assets subject to the attachment was not unconstitutional.

A lower court's decision has supplemented the Supreme Court's opinion by holding that the President's decision to declare an emergency, and thus invoke the IEEPA, is not subject to judicial review.[61] The despairing attorney for Dames and Moore surveyed the wreckage of his client's position and proclaimed, "The power afforded the President under *Dames and Moore v. Regan* is so sweeping there is little that American businesses can do to protect themselves . . . ."[62]

Foreign investors and their advisors should note that the IEEPA has only been invoked against foreign governments and their agencies; it has not yet been used against individuals (other than the ex-Shah). In addition, the United States government has allowed the frozen assets of individuals to be paid to their foreign owners once the alien leaves his country and enters the United States.[63] Cubans affected by freeze orders have generally been able to receive their assets under a special "refugee" license upon emmigrating from Cuba, if they can provide appropriate proof of their ownership of the assets.

A vesting order under section 5 of the TWEA is far more severe than a freeze order. Under current law, it can only be issued by the government during time of declared war.[64] Unlike freezing, vesting orders apparently have not been issued with blanket coverage, but only with reference to specific property. Once issued, the order transfers title to the property specified in the order to the Alien Property Custodian, an office of the United States government, which may then retain, use or sell the asset for the benefit of the United States.[65] The power to vest extends in theory to any property or interest in which any foreign country or national thereof (and not just the declared enemy) has any interest, in whole or in part. Non-enemies, however, may sue to recover their property after vesting so that, in effect, only "enemy-tainted" property may be confiscated.[66]

The procedures in the act are summary. A demand by the Alien

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[61] United States v. Spawr Optical Research, Inc., 685 F.2d 1076 (9th Cir. 1982).

[62] Howard, *Implications of the Iranian Assets Case for American Business*, 16 INT'L LAW. 128, 138 (1982).

[63] *See* Reeves, *The Control of Foreign Funds by the United States Treasury*, 11 LAW & CONTEMP. PROBS. 17, 38 (1945); Knight, *supra* note 3, at 12.

[64] Prior to the enactment of the International Economic Emergency Powers Act and the related amendment to the TWEA, the President could invoke section 5(b) "[d]uring the time of war or during any other period of national emergency declared by the President." *See* 50 U.S.C. app. § 5(b)(1) (1976) (repealed 1977). One appeals court found this section, together with a Korean War declaration of national emergency, to be sufficient to uphold President Nixon's unilateral imposition of a 10% surcharge on imports in August 1971. United States v. Yoshida Int'l, Inc., 526 F.2d 560 (C.C.P.A. 1975).

[65] 50 U.S.C. app. § 5(b)(1) (1976).

[66] *See* Clark v. Uebersee Finanz-Korporation, A.G., 332 U.S. 480, 485 (1947).

Property Custodian for possession of the property is tantamount to a taking. No defense may be raised to delay the Government's exercise of its rights.[67] Even after vesting, the only real issue is whether the property in fact was enemy-tainted,[68] although a few courts have (improperly) inquired whether the property was being used to promote the enemy war effort and whether the alien was truly an "enemy."[69] In a proceeding brought after vesting to promptly recover on the grounds that the property at issue is not enemy-tainted, the burden of proof is always on the claimant, even if an American citizen.[70] In exercising his powers, the Alien Property Custodian may replace the officers of a corporation, cancel issued and outstanding stock certificates and cause new certificates to be issued.[71] Restraints imposed by state law on the alienation of ordinary interests in property cannot defeat the Alien Property Custodian's power to act.[72]

Prior to 1941, the TWEA limited the President's power to the property of enemy aliens, that is countries and nationals thereof with whom the United States was at war. Before America's entry into the Second World War, Germany was "notorious" for developing techniques to conceal ownership or control of property ostensibly in friendly or neutral hands and thus beyond the power of the Act.[73] Congress closed this avenue of escape by amendment in 1941, in an effort to make vain every attempt to avoid the TWEA by legal rearrangements of form.

> Thus, under the 1941 amendment the nonenemy character of a foreign corporation because it was organized in a friendly or neutral nation no longer conclusively determines that all interests in the corporation must be treated as friendly or neutral. The corporate veil can now be pierced. Enemy taint can now be found [merely] if there are enemy officers or stockholders; even if the presence of some non-enemy stockholders does not prevent seizure of all the corporate assets.[74]

The Executive's authority under the TWEA is extensive:

> There is no doubt that under the war power [of the Constitution], as heretofore interpreted by this Court, the United States, acting under a statute, may vest in itself the property of a national of an enemy nation. Unquestionably to wage war successfully, the United States may confiscate enemy property. Nor can there, we think, be any doubt that any property in this country of any alien may be summarily reduced to pos-

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[67] *See* Bishop, *Judicial Construction of the Trading with the Enemy Act*, 62 HARV. L. REV. 721, 726-29 (1949).

[68] Kaufman v. Societe Generale pour Participation Industrielles et Comerciales, S.A., 343 U.S. 156, 159 (1952).

[69] *See, e.g.*, Josephberg v. Markham, 152 F.2d 644 (2d Cir. 1945); In re: Herter's Estate, 193 Misc. 602, 83 N.Y.S.2d 36 (Sur. Ct. 1948), *aff'd*, 274 A.D. 979, 84 N.Y.S.2d 913 (1948). *See also* Bishop, *supra* note 67, at 740.

[70] Draeger Shipping Co. v. Crowley, 55 F. Supp. 906, 912 (S.D.N.Y. 1944).

[71] Silesian-American Corp. v. Clark, 332 U.S. 469, 477 (1947).

[72] Great N. Ry. v. Sutherland, 273 U.S. 182, 193-94 (1927); Miller v. Kaliwerke Ascherleban Aktien-Gesellschatt, 283 F. 746, 751 (2d Cir. 1922). *See also* Bishop, *supra* note 67, at 738.

[73] *See Clark*, 332 U.S. at 484.

[74] *Kaufman*, 343 U.S. at 159.

> session by the United States in furtherance of the war effort . . . . The problems of compensation may await judicial process.[75]

Despite the amendment to the TWEA, during World War II a variety of cloaking devices were used in attempts to hide German or Japanese participation in American enterprises. It is unknown how many succeeded because they went undetected, but the record of the Alien Property Custodian against those investments whose ownership was traced is impressive. According to a senior attorney with the Alien Property Custodian, devices such as trusts, unregistered or bearer shares, ownership by American citizens, control by recourse to the personal or business loyalty of the nominal owners or managers and controlling options were all discovered and successfully attacked.[76]

A few examples from World War II emphasize the legal futility of these devices. Certificates of stock in a Delaware corporation were registered in the name of a Swiss corporation which held them beneficially for a German corporation. The share certficates were pledged to Swiss banks to secure various loans and were deposited with those banks. The Alien Property Custodian cancelled the certificates and had new ones issued to it.[77]

In June 1940, a German corporation sold its shares in an American corporation to an American citizen for a nominal price. The American corporation remained heavily indebted to its former owner. The American corporation was held to be owned by its creditor and former legal owner.[78]

A Japanese citizen executed a power of attorney in favor of Hawaiian attorneys which authorized them to buy, sell, lease and mortgage certain real property. The attorneys were also attorneys-in-fact for the Japanese man's wife and son who was an American citizen. Purporting to act pursuant to the power of attorney, the attorneys attempted to transfer real property owned by the Japanese man to the son as a gift. Thereafter, the rent received from the family's business located on the property was paid to the son. The Alien Property Custodian successfully avoided the transfer.[79]

A Swiss corporation held stock in various American corporations. The Swiss corporation's stock was owned by a naturalized citizen of Liechtenstein, subject, however, to a "usufruct"[80] in favor of his parents, who were citizens of Germany. The court held that the son's acquired citizenship was suspect, and that in any event, true ownership and con-

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[75] *Silesian-American Corp.*, 332 U.S. at 475-76.

[76] *See* Reeves, *supra* note 63.

[77] *Silesian-American Corp.*, 332 U.S. at 474-79.

[78] Beck v. Clark, 88 F. Supp. 565, 567-68 (D. Conn. 1949).

[79] Kaname Fujimo v. Clark, 88 F. Supp. 1, 4-5 (D. Hawaii 1947).

[80] An "usufruct" is a German civil law property interest similar to a trust. *See* Lepaulle, *Civil Law Substitutes for Trusts*, 36 YALE L.J. 1126 (1927).

trol remained with the German parents.[81]

In each of these instances, the Alien Property Custodian's claim to the assets was upheld by the courts.[82] Where family relationships were used to cloak beneficial ownership, the courts were particularly inclined to disregard legal formalities. The Alien Property Custodian was authorized and encouraged to "look through and beyond the technicalities of the law of conveyance to the realities. Family arrangements are subject to close examination, and factual control is more significant than the niceties of legal title."[83]

IV. Trusts as Protective Devices

Both United States trusts and offshore trusts are often proposed as solutions to the foregoing problems of home country confiscation and United States freezes and vesting.[84] When offshore trusts are used, elaborate provisions for "decanting" the trust assets or moving the domicile of the trust to another jurisdiction are provided, in the event the offshore jurisdiction, instead of the investor's home country, suffers the war or revolution.[85] Regardless of the trust's situs, the trust instrument must contain intricate triggering mechanisms that either establish or fund the trust in the first place, or, if already in existence, change the beneficiaries, make the trust irrevocable or otherwise alter its peacetime nature to meet the exigencies of the emergency. The actual suitability of these trusts depends on the nature of the emergency.

A. Action by the United States

As previously noted, all persons, entities and property subject to the jurisdiction of the United States are subject to the operation of the Trading with the Enemy Act.[86] Comprehensive reporting requirements enforce this broad coverage.[87] No device that leaves assets in the United States, therefore, offers legal protection from the operation of this legislation.[88] The World War II experience suggests that only the discretion of

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[81] Uebersee Finanz-Korporation, A.G. v. Brownell, 121 F. Supp. 420 (D.D.C. 1954).

[82] *See also* Stoehr v. Wallace, 255 U.S. 239 (1921) (voting trust).

[83] *Kaname Fujimo*, 71 F. Supp. at 4.

[84] *See* Knight, *supra* note 3; Warren, *Personal Trusts for Nonresident Aliens*, 121 TR. & EST. 36 (Apr. 1982); Klein, *supra* note 7.

[85] *See* Knight, *supra* note 3, at 5, 9.

[86] 50 U.S.C. app. § 5(b) (1976).

[87] The President shall . . . require any person . . . to furnish under oath . . . complete information relative to any act or transaction referred to in this subdivision . . . or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest . . . and . . . the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person.

Id. § 5(b)(1) (Supp. V 1981).

[88] Obviously, a foreign trust may offer certain practical obstacles to a government investigation to determine the beneficial owners of the trust.

the United States government in determining who really is an enemy protects the foreign investor in time of war.[89] Likewise, the executive orders issued during, and at the conclusion of, the Iranian hostage crisis, suggest that the government's power under the IEEPA is sufficient to overcome any legal barriers to the operation of United States jurisdiction over United States assets.

Against this background, both United States and offshore trusts seem inferior. A United States trust is especially frail, since it offers minimal practical obstacles to investigations by the government. A United States trust lacks even the ancillary benefit of estate tax planning benefits which a foreign trust, coupled with a foreign corporate holding company, offers.[90] Although it may have other estate planning purposes, if these are not sufficient in themselves to justify a United States trust, the supposed political security benefits of such a trust should not alter this analysis.

B. Action by a Foreign Government

The strongest United States legal defense against attempted foreign confiscation of United States assets is the territorial limitation on the act of state doctrine. Although it has been questioned,[91] it is difficult to find a more firmly entrenched public policy than the one against arbitrary confiscation of private property. The Fifth Amendment to the United States Constitution does not directly protect the assets of foreign investors from their home governments, but it does reflect a fundamental prejudice of our legal system. Although it is conceiveable that a court might reject the limitation under certain circumstances for foreign policy or other reasons, it cannot be confidently stated that a court so inclined would be deterred by recourse to a trust.

V. Interruptions in Communications

A third situation which calls for protective planning is a political emergency, natural catastrophe or personal crisis which, while not involving a freeze or a seizure of assets, nonetheless interrupts or disrupts communications between the investor and the United States. At least from this side of the Atlantic, personal kidnapping, civil disturbances resulting in an interruption of communications, or even war seem more

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[89] It is reported that the United States government did not vest the United States assets of foreign corporations which transferred their corporate domicile out of enemy occupied territory during World War II. Note, *Corporations in Exile*, 43 COLUM. L. REV. 364, 369-70 (1943). On the other hand, courts have ignored the nominally neutral citizenship of aliens if they determine that the alien's true loyalties belong to an enemy. *See, e.g.*, Uebersee Finanz-Korporation v. Clark, 82 F. Supp. 602 (D.D.C. 1949) (acquired Liechtenstein citizenship disregarded).

[90] Shares of stock in a foreign corporation held by a nonresident alien are not property situated within the United States and hence are not subject to the estate tax. I.R.C. §§ 2104(a), 2103. *See* Langer, *Legal Structures Used in International Estate Planning*, in CURRENT LEGAL ASPECTS OF INTERNATIONAL ESTATE PLANNING 204, 206 (1981).

[91] *See supra* notes 31-42 and accompanying text.

likely perils for a West European investor than attempted confiscation of their United States assets by their home governments.[92] It is difficult to draft in advance a trust instrument which anticipates and effectively deals with all of these contingencies.

VI. Power of Attorney

The situations which might require firm guidance and control to be exercised from the United States over United States investments are quite varied. A broad, durable power of attorney executed pursuant to applicable state laws,[93] in favor of the investor's United States legal counsel, seems to offer the greatest possible flexibility for dealing with emergencies of this type. The instrument should grant the attorney-in-fact the widest possible power to deal with the principal's property, so that the attorney-in-fact would be fully empowered to do everything that the principal could do if personally present, from voting shares, to exercising power of office in a closely held corporation. Moreover, the attorney-in-fact should have total discretion to act pursuant to these powers. The instrument itself should have no internal reference to preconditions and limitations to its use; these should be contained in a separate letter of instructions to the attorney. Instructions, of course, are not self-executing, and contain no inherent safeguards against abuse. It may be cold comfort, but at some point a foreign, nonresident investor must rely on the professional and personal ethics of his counselors or trustees. Although executed, the power of attorney should not be filed with a county register of deeds until the attorney acting pursuant to the letter of instructions decides it is appropriate to exercise his powers under the instrument. The letter of instruction and even the power of attorney (prior to filing) are privileged communications from a client to his attorney and are safe from disclosure until used.

Once filed, the attorney can decide how best to act under the power for the benefit of his client. If appropriate at that time, he may transfer assets to a trust,[94] a holding company, or take other defensive action. Best of all, in situations which might inappropriately trigger the automatic emergency instructions of a trust, the attorney can exercise his discretion and decide not to act. For example, it has been reported that when the Governor-General of Bermuda was assassinated in 1973, a number of trusts fled the island under automatically triggered doomsday provisions.[95] A competent attorney-in-fact acting under a power of attorney might not have acted so precipitously. If the Russian submarine

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[92] It should be noted that expropriation of assets accompanied by some consideration, however adequate, is entirely possible. *See* Loyrette & Gaillot, *The French Nationalizations: The Decisions of the French Constitutional Council and Their Aftermath*, 17 GEO. WASH. J. INT'L L. 17 (1983). *See also supra* note 12.

[93] *See, e.g.*, N.C. GEN. STAT. § 32A-1 (1983).

[94] *See Fred S. James & Co.*, 247 N.Y. 262, 160 N.E. 364.

[95] *See* Knight, *supra* note 3, at 9.

that recently went aground in Sweden had instead been sailing near the Netherlands Antilles, an even more precipitous flight of trusts and corporations can be imagined.

The legal effect of a power of attorney has been tested in the United States courts under extreme conditions. Where the court was hostile to the confiscating government and sympathetic to the efforts of the attorney-in-fact to protect the United States assets for the benefit of United States creditors and the pre-seizure owners, the use of the instrument was vindicated.[96] This was true despite the shaky legal theory which allowed the attorney-in-fact to act on behalf of a corporation which had been dissolved by the government of the state in which it was organized. In *Fred S. James & Co. v. Rossia Insurance Co. of America*,[97] the court upheld the creation of a Connecticut corporation by the attorney-in-fact for a corporation organized under the laws of the Russian Empire and dissolved by the Bolsheviks. The Connecticut corporation received the United States assets of the Russian corporation and issued stock to the attorney in trust for the benefit of the old corporation's owners and United States creditors. The New York Court of Appeals held that the exigencies of the emergency justified and authorized the attorney's action.[98]

In contrast, where the transfer was designed to avoid vesting by the United States under the TWEA, the power of attorney was found to be inadequate to effect the attempted transfer.[99] A power of attorney thus does not increase the protection already granted by the existing inclinations and doctrines of United States courts, such as the territorial limitation or the act of state doctrine. It does, however, add considerable flexibilty to that protection.

A power of attorney avoids many problems inherent in the use of offshore or domestic trusts: It does not commit the owner to a predetermined and inflexible course of action; there can be no premature triggering of a power of attorney; and its use does not run the risk of adverse tax consequences in either the United States or the trust situs.[100] Although beyond the scope of this article, there can be substantial difficulties, particularly with regard to the Foreign Real Property Tax Act,[101] in this regard.

Many foreign investors seek United States visas in connection with their investments. Elaborate planning is often necessary to secure permanent and even temporary visas. Given the current backlog in the third and sixth preference categories for permanent visas, the investor often must seek an L-1 or E-2 nonimmigrant visa as an interim or even

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96 *See Fred S. James & Co.*, 247 N.Y. 262, 160 N.E. 364.

97 247 N.Y. 262, 160 N.E. 364.

98 *Id.* at 270, 160 N.E. at 367.

99 *Kuname Fujimo*, 71 F. Supp. at 4-5.

100 *See* Klein, *supra* note 7; Knight, *supra* note 3, at 10-12.

101 I.R.C. § 897 (Supp. V 1981). *See generally* P. POSTLEWAITE, INTERNATIONAL CORPORATE TAXATION § 2.28 (Supp. 1984).

alternative measure to a green card. The L-1 visa allows qualified aliens to transfer their employment temporarily from a foreign company to an affiliated United States enterprise.[102] The E-2 visa is granted to citizens of certain "treaty countries" who seek to enter the United States temporarily for the purpose of managing and directing a substantial investment in a United States enterprise.[103]

An important requirement for the L-1 visa is that the alien be employed in the United States by a branch, subsidiary or affiliated company of his employer abroad. The affiliation must be shown. If either employer is an operating company which in turn is anonymously owned by a tax haven trust, the alien will not qualify for the visa unless this relationship is revealed to the Immigration and Naturalization Service (INS) in order to prove that the United States operating company is affiliated with the foreign operating company. Some of the reasons which led the alien investor to create the trust initially may well be defeated or compromised by such disclosure. The problem is worse if the investor seeks an E-2 treaty investor visa, because proof is required that the United States investment which the investor manages and directs is *owned* by the investor personally or by an entity which is a national of the investor's country (assuming there is an appropriate treaty between the investor's country and the United States). It can be assumed that the trust will not be organized under the laws of the investor's home country, and thus superficially will not be resident in that country. Therefore, at a minimum the investor would have to reveal that he or she was the settlor and beneficiary of the trust, and so was the beneficial owner of the trust's assets.[104] Unfortunately, it is not clear whether the INS would accept this analysis of beneficial ownership and agree that the trust was "owned" by a national of the treaty country. If it did not, and instead ruled that the investment was owned by the trust, a resident of another country entirely, the investor will not qualify for the E visa. These problems do not arise where title to the assets remains with the foreign investor and only the power to deal with the assets is transferred via the power of attorney.

The power of attorney described in this article does not offer complete protection for the United States assets of a foreign investor. More elaborate protective mechanisms, however, do not offer any greater protection. The power of attorney, at least, gives the investor full flexibility to take advantage of the public policy of the United States against enforcing foreign confiscation decrees against United States assets. Other advantages include the elimination of the risk that third country "havens" might prove unworthy of their name, and the avoidance of tax

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[102] 8 U.S.C. § 1101(a)(15)(L) (1982).

[103] 8 U.S.C. § 1101(a)(15)(E) (1982). The E-2 visa can be a satisfactory permanent alternative to a green card since it will be renewed so long as the alien maintains his investment.

[104] *See* 5 U.S. Dep't of State, Visa Services Bull. no. 20.

problems which might result from transferring the legal title to United States assets from one foreign entity to another. Most importantly, the handling of the United States assets is left to the unencumbered judgment of the investor's United States attorney, who is likely to be quite familiar with these properties. In short, this relatively simple document may provide far greater protection than a trust which is more expensive to establish and maintain.